

Interstate Cigar Co., Inc. and L. S. Amster Co., Inc. and Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 29-CA-9012

July 9, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Upon a charge filed on July 10, 1981, by Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Interstate Cigar Co., Inc. and L. S. Amster Co., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on July 22, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 11, 1981,¹ following a Board election in Case 29-RC-4969, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;² and that, commencing on or about June 29, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 31, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 24, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment (which was subsequently amended). Subsequently, on December 4, 1981, the

Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits the operative facts set forth in the complaint and denies only the conclusionary averments while affirmatively contending simply that the Union was not properly certified and thus did not represent a majority of the employees. Respondent contends that a new election should be held in order to establish a majority or lack thereof.

Review of the record herein, including the record in Case 29-RC-4969, reveals that an election pursuant to a Stipulation for Certification Upon Consent Election resulted in a vote of 59 to 49 in favor of the Union with 5 ballots challenged. Respondent, on June 18, 1980, filed an unfair labor practice charge in Case 29-CB-4210 alleging that the Union violated Section 8(b)(1)(A) of the Act by restraining and coercing its employees by physically preventing ingress to and egress from its facility, by threatening its employees, and by photographing its employees who attempted to cross a picket line at Respondent's facility. Respondent also filed timely objections to conduct affecting the results of the election which, *inter alia*, included the conduct alleged as unfair labor practices in Case 29-CB-4210. On August 14, 1980, the Regional Director issued a complaint and notice of hearing in Case 29-CB-4210. On August 29, 1980, after investigation of the objections *supra*, the Regional Director issued his Report on Objections, Order Consolidating Cases and Notice of Hearing in Cases 29-RC-4969 and 29-CB-4210 in which he overruled all of Respondent's objections except that portion of Objection 1 which relates to the blocking of ingress to and egress from Respondent's plant, the writing down of license plate numbers of vehicles attempting to cross the picket line, and the photographing of employees trying to cross the picket line and threatening employees. He found that these issues raised substantial and material issues of fact, including issues of credibility, which could best be resolved in a hearing. On August 29, 1980, the Union filed its answer to the complaint in Case 29-CB-4210 in which it denied

¹ Official notice is taken of the record in the representation proceeding, Case 29-RC-4969, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² 256 NLRB 496.

the allegation of unfair labor practices, and, on September 22, filed its exceptions to the Regional Director's report. On September 30, the Board issued its Decision and Order³ in which it adopted the Regional Director's report and remanded the case to the Regional Director for the purpose of conducting a hearing pursuant to his report of August 29, 1980.

A hearing was held on December 8-10, 1980, in Cases 29-RC-4969 and 29-CB-4210 before Administrative Law Judge Raymond P. Green, who issued his Decision on February 19, 1981, in which he recommended that the complaint be dismissed in its entirety, that the involved portion of Objection 1 be overruled, and that the Union be certified as the exclusive collective-bargaining representative in the unit stipulated to be appropriate. On January 21 and March 18, 1981, the General Counsel and Respondent, respectively, filed exceptions to the Administrative Law Judge's Decision and the Union filed a brief in support thereof. On June 11, 1981, the Board issued its Decision, Order, and Certification of Representative⁴ in Cases 29-RC-4969 and 29-CB-4210 in which it certified the Union as exclusive bargaining agent of the employees in a unit of all drivers, warehousemen, maintenance men, porters, and shipping and receiving employees, employed by the Company at its facilities located at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, excluding all salesmen, office clerical employees, guards and supervisors as defined in the Act. On July 30, 1981, Respondent filed a petition for election in Case 29-RM-654, requesting that an election be held in the certified unit. On August 14, 1981, the Regional Director dismissed the petition and Respondent did not file a request for review of the Regional Director's dismissal. It thus appears that Respondent is attempting in this proceeding to relitigate matters fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁵

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein

which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Interstate Cigar Co., Inc. and L. S. Amster Co., Inc., are New York corporations, and are affiliated businesses with common officers, owners, and directors which constitute a single integrated business enterprise engaged in the sale and distribution of over-the-counter drugs and related products. During its past fiscal year, Respondent sold and shipped from its New York facilities products valued in excess of \$50,000 which were shipped in interstate commerce directly to States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All drivers, warehousemen, maintenance men, porters, and shipping and receiving employees employed by the Respondent at facilities located at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, excluding all salesmen, office clerical employees, guards and supervisors as defined in the Act.

³ Not reported in volumes of Board Decisions.

⁴ 256 NLRB 496.

⁵ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

2. The certification

On June 13, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 11, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about June 18, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 29, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 29, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Interstate Cigar Co., Inc. and L. S. Amster Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All drivers, warehousemen, maintenance men, porters, and shipping and receiving employees employed by Respondent at its facilities located at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, excluding all salesmen, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 11, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 29, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Interstate Cigar Co., Inc. and L. S. Amster Co., Inc., Westbury and Hicksville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All drivers, warehousemen, maintenance men, porters, and shipping and receiving employees employed by the Employer at facilities located at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, excluding all salesmen, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, copies of the attached notice marked "Appendix."⁶ Copies of said

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local 707, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All drivers, warehousemen, maintenance men, porters, and shipping and receiving employees employed by us at our facilities located at 255 and 275 Grand Boulevard, Westbury, New York, and 530 John Street, Hicksville, New York, excluding all salesmen, office clerical employees, guards and supervisors as defined in the Act.

INTERSTATE CIGAR CO., INC. AND L.
S. AMSTER CO., INC.